

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CALIFORNIA REALTY SERVICES
CORP.,

Plaintiff and Respondent,

v.

BONNIE BRADLEY,

Defendant and Appellant.

G032500

(Super. Ct. No. 02CC10044)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Dennis Nelson, attorney for Defendant and Appellant, Bonnie Bradley.

Wendy W. Huang, attorney for Plaintiff and Respondent, California Realty Services Corp., a Nevada Corporation.

*

*

*

Bonnie Bradley signed a personal guaranty of the commercial lease for the premises of her husband's foreign currency exchange company. When the company

went bankrupt and failed to pay its rent, the landlord, California Reality Services, brought this action against her on the guaranty and subsequently a summary judgment motion. Bradley refused to pay the remainder of the rent because the landlord had locked her husband out of the premises, a fact which formed the basis of Bradley's opposition to the summary judgment motion and on which she now bases this appeal. We affirm because it was the other officers of her husband's company who requested the locks be changed due to her husband's defrauding the company and its clients, and the lockout was independent of the obligation to pay rent because the real tenant was the company, not Bradley's husband.

FACTS

Michael Bradley founded United Forex in January 2001. United Forex was not simply an alter ego of the Bradleys, but was a corporation that included other officers who ran the daily operations. (These officers were Darren Smith, president and secretary; Rick Smith, vice-president; and Jurgen Foster, chief financial officer. United Forex also had in-house counsel. For the first 30 days of the company's formation Bonnie Bradley had been the chief financial officer.)

In July 2001, United Forex leased commercial property from California Realty. Michael Bradley signed the lease on behalf of the company as chief executive officer. In order to secure the lease, California Realty required Michael and Bonnie Bradley to each sign personal guaranties.

The events that led to United Forex's default on the lease began in December 2001, when a quorum of the board of directors for United Forex met to discuss the issue of alleged fraudulent conduct by Michael Bradley.¹ At this meeting, the board determined that due to a pending criminal case against him, Michael Bradley should not be allowed to enter United Forex's offices. As a result, the board, *on behalf of United Forex*, sent the minutes of the meeting and a corporate resolution to California Realty requesting it to change the locks to keep Michael Bradley away from the premises.

¹ In January 2003, Michael Bradley and Darren Smith pled guilty to conspiracy to commit wire fraud for transferring clients' funds without their acknowledgment or consent.

Michael Bradley was locked out of the offices from December 2001 through March 2002, when United Forex vacated the premises. United Forex had paid rent only for the first eight months of the 36-month lease.

Upon discovering the vacated premises, California Realty attempted to re-lease the premises by listing the availability in two commercial multiple listing services. California Realty was unable to lease the property for the remainder of the lease term. The Bradleys refused to pay rent for the remaining 28 months.

The guaranty of lease signed by Bonnie Bradley contained a clause allowing the lessor to pursue a claim against the guarantor without any notice or demand on the lessee or other guarantors, i.e., the clause allowed California Realty to demand payment from Bonnie Bradley without pursuing United Forex or Michael Bradley. In addition, the guaranty explicitly stated, “[a]ny married person who signs this [g]uaranty expressly agrees that recourse may be had against his/her separate property for all of his/her obligations hereunder.”

California Realty sued United Forex, Michael Bradley and Bonnie Bradley for the remainder of the rent payments. A default judgment was entered against United Forex and California Realty moved for summary judgment against the Bradleys.

In July 2003, the court granted the summary judgment motion in favor of California Realty, stating it had “met its burden of proving each element of its [b]reach of [c]ontract cause of action against” Michael and Bonnie Bradley. After reviewing the moving and responsive papers, the court determined Bonnie Bradley had not “presented admissible evidence which establishe[d] a defense to the cause of action.”

Michael Bradley did not appeal the judgment. His wife Bonnie did. In this appeal, Bonnie Bradley essentially argues that because Michael Bradley was locked out of the premises in December 2001, California Realty was not entitled to summary judgment, despite the fact that she did not include the fact of the lockout in her separate statement of disputed facts in opposition to the summary judgment motion. As we shall now explain, her appeal is based on a false-dichotomy, i.e., that the choice before the trial court was *either* recognizing the fact of the lockout and denying the motion, or ignoring it

and granting the motion. The lockout was *irrelevant* to California Realty's entitlement to prevail on the guaranty, and therefore putting that fact in the separate statement would have made no difference.

DISCUSSION

Bonnie Bradley bases her appeal on the theory that California Realty breached the lease *first* by locking out Michael Bradley and that if she had included this in her opposition to the separate statement, the court would not have granted California Realty summary judgment.

Her theory is incorrect because the lease was between California Realty and United Forex, not between California Realty and Michael Bradley. It makes no difference whether the fact of the lockout would have been included in the separate statement, or merely buried in the opposition evidence but not separately identified in the separate statement.² Having shown the undisputed facts that Bonnie Bradley had signed the guaranty and *United Forex* had not paid the rent, the burden shifted back to Bonnie Bradley to show that she was excused. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 861.) Merely showing that her husband had been locked out of the premises *at the request of United Forex itself* hardly excused her own obligation under the guaranty. (See Civ. Code, § 2807 [“A surety who has assumed liability for payment or performance is liable to the creditor immediately upon the default of the principal, and without demand or notice.”].)

Bonnie Bradley also raises the issue of the mitigation of damages. (Cf. *Green v. Smith* (1968) 261 Cal.App.2d 392, 397 [injured party must act “reasonably and with due diligence”].) California Realty's moving papers included, in that regard, declarations from leasing agents to the effect that the firm promptly listed the premises in the two largest commercial multiple listing services. Bonnie Bradley now argues on appeal that the declarations by the leasing agents were merely self-serving and she “should have the right to cross-examine” them.

² Accordingly, whatever tension there is in the law of summary judgment as concerns evidence that makes it into the “papers” but not the separate statements (a tension discussed in *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315-316) is irrelevant in this case.

No. Having failed to adduce any specific evidence to contradict the declarations, her argument must fail. (See *Vitagraph, Inc. v. Liberty Theatres Co. of California* (1925) 197 Cal. 694, 699 [“the burden of proof is upon the defendant to prove the facts in mitigation of damages”].) In the context of a summary judgment motion, a litigant only gets to cross-examine a declarant if he or she has some evidence to contradict what the declarant says about an issue of material fact.

CONCLUSION

The judgment is affirmed and respondent shall recover its costs on appeal.

SILLS, P.J.

WE CONCUR:

ARONSON, J.

IKOLA, J.